Supreme Court, U.S.
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No. 94-841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ARKANSAS WILDLIFE FEDERATION,

Petitioner,

v.

ICI AMERICAS INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Section 33 U.S.C. §1319(g)(6)(A) of the Clean Water Act bars plaintiff's citizen suit brought under that Act where the state had previously commenced and was diligently prosecuting an administrative enforcement action against the defendant for the same alleged violations under a comparable state law, and the plaintiff had actual notice of, and an opportunity to intervene in, the state action before initiating the citizen suit?

2. Whether the preclusive effect of 33 U.S.C. §1319-(g)(6)(A) extends to plaintiff's claims for declaratory and injunctive relief, as well as plaintiff's claim for civil penalties?

LIST OF PARTIES

The parties to the proceeding are Petitioner, Arkansas Wildlife Federation, and Respondent, ICI Americas Inc. (now known as ZENECA Inc.).*

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*ZENECA Inc. became the legal successor to ICI Americas Inc. on January 1, 1993. The parent companies of ZENECA Inc. are: ZENECA Group PLC; ZENECA Limited; and ZENECA Holdings, Inc. Subsidiaries of ZENECA Inc. which are non-wholly owned are: Corpus Christi Global Chemicals Company; Garst Research Farms, Inc.; and Image Polymers Company.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent ICI Americas Inc. ("ICI") respectfully requests that the Court deny the Petition for a Writ of Certiorari submitted by Petitioner, Arkansas Wildlife Federation ("AWF").

STATEMENT OF THE CASE

ICI is dissatisfied with the statement of the case submitted by AWF and submits this restatement containing additions and corrections.

ICI operates a facility in North Little Rock, Arkansas that formulates liquid and granular herbicides for agricultural usage. On September 30, 1988, the Arkansas Department of Pollution Control and Ecology ("ADPC&E") issued a stormwater discharge permit to ICI under the state-administered National Pollutant Discharge Elimination System ("NPDES") permit program.[1] The permit was made effective from November 1, 1988 through October 31, 1993, and authorizes ICI to discharge stormwater runoff[2] through three point sources on its property (outfalls 001, 002, and 003) subject to specific conditions, including a requirement that ICI periodically monitor the discharge and report the results to ADPC&E in order to demonstrate that the concentrations of various pollutants do not exceed limits set by ADPC&E pursuant to federal and state NPDES regulations. The permit allows ICI to discharge the stormwater into an underground stormdrain owned by the City of North Little Rock, where it mixes with other stormwater and then travels several miles through

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[1] Pursuant to 33 U.S.C. §1342, the United States Environmental Protection Agency ("EPA") has delegated authority to the State of Arkansas to issue NPDES permits. *See* 51 Fed. Reg. 44518 (Dec. 10, 1986).

[2] ICI's facility produces no industrial process wastewater in its formulation operations; the only effluent that ICI discharges under its permit is rain which contacts the facility and surrounding property. The facility was among the first in Arkansas to be regulated under an NPDES permit solely for stormwater discharge.

a series of ditches and canals before ultimately reaching the Arkansas River.

Between December, 1988 and February, 1991, ICI reported to ADPC&E various instances of noncompliance with the effluent limitations in its permit. In response to those reports, ADPC&E sent various notices informing ICI that the noncompliances were permit violations subject to enforcement action under the Arkansas Water and Air Pollution Control Act ("AWAPCA"), Ark. Code Ann. §8-4-101 *et seq.*, and requesting that ICI take all reasonable measures necessary to prevent recurrence of those violations.

By letter dated February 15, 1991, ADPC&E notified ICI that it was "subject to enforcement action under the Arkansas Water and Air Pollution Control [Act]" due to the continuing violations of its NPDES permit and requested a meeting to discuss the enforcement action. During the course of that meeting, which was held on March 5, 1991, ICI employees presented to ADPC&E enforcement personnel a copy of a multi-step compliance action plan that the company had begun implementing in the fall of 1990. The compliance plan included substantial engineering modifications and other measures expected to cost the company almost $500,000. After evaluating the compliance action plan, ADPC&E prepared a Consent Administrative Order ("CAO") in settlement of the enforcement action. ADPC&E agreed that the CAO, when written, would address all previous violations under ICI's permit and would require the company to pay a civil penalty of $1,000, and complete implementation of the measures in the compliance action plan by December 31, 1991. The CAO was subsequently executed and became effective on April 16, 1991—six months before AWF filed its complaint in this case.

After the CAO was executed, ICI realized that the order failed to expressly state that the settlement had covered all prior violations under ICI's permit and, instead, had listed only the thirty most recent noncompliances. When ICI brought this to ADPC&E's attention, the Department revised the CAO to accurately list each noncompliance dating from November 1988 to conform to the parties' original intent. The CAO, which remained the same in all other respects, was then reissued on September 9, 1991, as a "Corrected Consent Administrative Order" ("Corrected CAO").

The CAO, both as originally issued and as corrected, provided that ICI would be required to pay additional civil penalties in the event ICI failed to comply with the effluent limits, deadlines, or other requirements set forth in the order. Furthermore, the CAO expressly left open the possibility of further remedies or sanctions by ADPC&E.

By the end of 1991, ICI had completed all of the engineering changes outlined in its compliance action plan, with the exception of removal of certain equipment, which was completed in January 1992. However, on December 26, 1991, ICI requested that ADPC&E extend the compliance deadline under the CAO until April 30, 1992, to allow ICI additional time to investigate sources of zinc contamination in its stormwater and implement any necessary corrective measures. Finding the request reasonable, ADPC&E issued an amendment to the Corrected CAO granting the extension; however, the Department also required in the amendment that ICI pay an additional $500 administrative penalty for various noncompliances after the date of the Corrected CAO.

On March 13, 1992, ICI requested from ADPC&E authorization to install additional piping for its stormwater drainage system in order to combine the existing outfalls (001, 002, and 003) into one main outfall (004) which would discharge stormwater from a single point source. ICI represented to ADPC&E that this modification would enable ICI to demonstrate compliance with all of its NPDES permit limits, including limits for zinc. ADPC&E approved ICI's request and issued a construction permit authorizing the modifications. Thereafter, on April 30, 1992, the Department issued a second amendment to the Corrected CAO to allow ICI until December 15, 1992, to come into full compliance with the conditions of its NPDES permit. This second amendment required ICI to, among other things, complete construction of Outfall 004 by July 31, 1992 and submit an application by June 15, 1992 to establish effluent limits for the new outfall; provide sampling results for Outfall 004 in addition to all three original point sources; and pay an additional $500 civil penalty. The amendment also extended to December 15, 1992 the date for full compliance with NPDES permit conditions, and further provided that as long as ICI remained in compliance with all other terms of the Corrected CAO, as amended, the company would not be assessed any additional penalties for the presence of zinc in its discharge. ADPC&E enforcement personnel anticipated that a new permit for Outfall 004 would be issued prior to December 15, 1992.

ICI completed construction and submitted its permit application for Outfall 004 within the deadlines specified in the second amendment. However, rather than issuing a new NPDES permit,[3] ADPC&E issued a third amendment

[3] ADPC&E was unable to issue ICI's permit for Outfall 004 at that time because the Department had not yet developed a methodology to impiement new effluent limits for metals, includ-

[footnote continued]

to the Corrected CAO, which provided that, effective December 15, 1992 and continuing until October 31, 1993 (the expiration date of ICI's permit), the sampling and reporting requirements for Outfalls 001, 002 and 003 were terminated. The amendment substituted Outfall 004 as the relevant discharge location for monitoring and reporting purposes, and made the discharge limitations for that outfall the same as those specified in the permit for the former main outfall, except a "report only" requirement was continued with respect to zinc. This third amendment also stated that there had been no violations since the previous amendment but, nevertheless, required ICI to pay a civil penalty of $500 "in compromise and full settlement of any claims for civil penalties, in particular, claims . . . for costs and expenses incurred by ADPC&E."

In the meantime, in May, 1991 AWF learned of ADPC&E's enforcement action against ICI and received actual notice of the original CAO.[4] Thereafter, by letter dated July 2, 1991, AWF notified ICI that AWF intended to file this citizen suit under the Clean Water Act. In response to the notice letter, ICI informed AWF that ADPC&E already had been prosecuting an enforcement action against ICI for the same permit violations alleged by AWF, and also outlined the measures which the company had been implementing under the compliance

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ing zinc, which EPA was in the process of establishing. *See* 57 *Fed. Reg.* 60848 (Dec. 22, 1992); App. 10a-11a.

[4] AWF has admitted that on May 21 or 22, 1991, its attorneys reviewed the NPDES permit files for ICI, including the CAO, while at ADPC&E's offices. All records, reports and other documents related to NPDES permits, including enforcement orders, are public documents available for inspection and copying by the general public at ADPC&E's offices during regular business hours. App. 13a-14a.

action plan. AWF subsequently received notice of the Corrected CAO on September 11, 1991—two days after the order was entered. Nevertheless, on October 15, 1991, AWF filed its complaint alleging that ICI had been in violation of its NPDES permit and seeking civil penalties, declaratory and injunctive relief, and litigation costs, including attorney's fees. AWF later received timely notice of each of the three amendments to the Corrected CAO. Although under the Department's regulations AWF was entitled to intervene in opposition to these orders and request an adjudicatory hearing, at no time did AWF attempt to intervene or otherwise participate in the ADPC&E enforcement action against ICI.

On November 5, 1991, ICI moved to dismiss AWF's complaint on the grounds that the action was jurisdictionally barred under 33 U.S.C. §1319(g)(6)(A)(ii) and (iii). The district court denied ICI's motion without prejudice and allowed limited discovery. On July 22, 1992, ICI filed a motion for summary judgment seeking dismissal of the complaint, again on the grounds that jurisdiction was barred under 33 U.S.C. §1319(g)(6)(A)(ii) and (iii). AWF opposed the motion and filed cross-motions for partial summary judgment and for injunctive relief.

In a final order dated April 8, 1993, the district court granted ICI's motion for summary judgment, dismissed AWF's cross-motions as moot, and dismissed AWF's complaint. The district court held that AWF's action was jurisdictionally barred under 33 U.S.C. §1319(g)(6)(A)(ii) since ADPC&E had commenced and was diligently prosecuting a prior enforcement action against ICI under state law comparable to Section 1319(g) for the same violations alleged in AWF's complaint. *Arkansas Wildlife Federation v. ICI Americas*

Inc., 842 F. Supp. 1140, 1144-50 (E.D. Ark. 1993). The court also held that the jurisdictional bar applied not only to AWF's civil penalty claim for past violations, but also to its requests for declaratory and injunctive relief. *Id.* at 1150.

AWF appealed the district court's decision to the Eighth Circuit. In an unanimous decision, the court of appeals affirmed the district court and held that the criteria in 33 U.S.C. §1319(g)(6)(A)(ii) were met under the facts in the case, thus barring AWF's action. *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 379-82 (8th Cir. 1994). In rejecting AWF's principal argument that ADPC&E's administrative enforcement process was not "comparable" to administrative enforcement by the federal government under 33 U.S.C. §1319(g), the court of appeals explained as follows:

> [T]he comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests. [citation omitted].
>
> Under those circumstances, the state statute should be presumed comparable unless the facts of the specific case demonstrate that the state denied an interested party a meaningful opportunity to participate in the administrative enforcement process. Notably, on the facts of the present case, AWF had actual notice of ADPC & E's issuance of the CAO when it inspected ADPC & E's files five months before this lawsuit was filed. AWF could have intervened in the administrative process but instead

> chose to collaterally attack the enforcement action through this federal lawsuit. We have no reason to believe that AWF would have been denied meaningful participation in the administrative process had it intervened. We therefore hold that the Arkansas statute is "comparable" to 33 U.S.C. §1319(g) for purposes of applying 33 U.S.C. §1319(g)(6)(A)(ii) to the present case.

29 F.3d at 381-82 (footnote omitted).

The court also held that because the original CAO, and the corrected and amended CAOs, had been part of a single, ongoing enforcement action by ADPC&E, the exception to jurisdictional preclusion set forth in 33 U.S.C. §1319(g)(6)(B)(ii) did not apply. *Id,* at 382. The court further held that the jurisdictional bar covered AWF's claims for declaratory and injunctive relief, as well as for civil penalties. *Id.* at 382-83.

SUMMARY OF THE ARGUMENT

The court of appeals has not decided a federal question in this case in a way that conflicts with applicable decisions of this Court. Nor has the Eighth Circuit rendered a decision in conflict with a decision of another circuit. In affirming the district court's order dismissing Petitioner's action, the court of appeals correctly applied the provisions of 33 U.S.C. §1319(g) to the facts of the case in a manner fully consistent with the language of Section 1319(g), the legislative purposes underlying that provision, as well as the legislative purposes of the Clean Water Act's citizen suit provision.

ARGUMENT

I.

THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In applying the provisions of 33 U.S.C. §1319(g)(6) to the facts in the present case, the Eighth Circuit did not depart from Supreme Court precedent concerning interpretation of federal statutes.

AWF's argument that the court of appeals' decision contradicts this Court's decisions regarding proper statutory construction brushes aside the fundamental rule that "a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. ___, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991). This Court has stressed over and over that "[i]n expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, ___ U.S. ___, 113 S.Ct. 2173, 2182, 124 L.Ed. 402 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 12 L.Ed. 1009 (1849)); *see also Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 12 (1990). Additionally, a literal reading of a statute which would lead to an "absurd" or "odd" result is to be avoided when the statute can be given a reasonable application consistent with its words and legislative purpose. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454, 180 S.Ct. 2558, 2567, 105 L.Ed.2d (1989); *Haggar Co. v. Helvering*, 308 U.S. 389, 394, 60 S.Ct. 337, 339, 84 L.Ed. 340 (1940).

The Eighth Circuit's construction and application of the statute in this case is true to the foregoing principles. In holding that 33 U.S.C. §1319(g)(6)(A)(ii) barred AWF's action, the court of appeals applied the provision's key terms in accordance with the ordinary meaning of those terms, and consistent with the object of the statute and the Clean Water Act as a whole.

1. More specifically, the court of appeals agreed with the district court's holding that ADPC&E "*commenced*" an administrative action when it issued the original CAO. 29 F.3d at 379-80. Both courts were correct on this point given that ADPC&E's issuance of an administrative order by consent constitutes initiation of a formal adjudicatory proceeding before that agency. ADPC&E Regulation No. 8, Part VII, § §2, 3.

The Eighth Circuit also agreed with the district court that the facts demonstrated ADPC&E was "*diligently prosecuting*" its administrative enforcement action against ICI within the meaning of Section 1319(g)(6)(A)(ii). 29 F.3d at 380-81. Contrary to AWF, "diligence" in prosecuting an administrative enforcement action should not be measured solely upon the agency's consideration of the penalty factors set forth in Section 1319(g)(3). While a state agency's consideration of factors such as those is relevant to determining whether the agency has acted diligently, it is also important to examine whether the agency has exercised other aspects of its enforcement authority in order to carry out its enforcement responsibilities (e.g., issue orders similar to those issued by EPA under Section 1319(a) to force compliance with the law).

The Eighth Circuit's finding that ADPC&E acted diligently in prosecuting its enforcement action against ICI is most amply supported by the record. As the district court recognized, ADPC&E entered orders requiring ICI

to "take whatever corrective action [was] necessary to eliminate and prevent recurrence of the effluent violations cited in the [orders]" and to report on the completion of the requisite corrective actions within specific deadlines. 842 F.Supp. at 1148. ADPC&E's orders also expressly left open the possibility of additional future remedies or sanctions by the Department. *Id.* at 1142. After execution of the original CAO, ADPC&E maintained ongoing supervisions over ICI's compliance efforts. The company implemented a comprehensive remedial action plan at a cost of more than half a million dollars, which resulted in the company achieving full compliance with the CAO and the applicable limitations of its NPDES permit. *See* 29 F.3d at 380. Based upon ICI's efforts, and the relatively short time periods involved, the district court found that ADPC&E acted reasonably in extending compliance deadlines. *Id.* at 1149. The district court further noted that:

> What [AWF] characterizes as arbitrary decisions on the part of ADPC&E appear to the Court as reasoned cooperative efforts to remedy noncompliances with the permit. Under the circumstances . . . , this Court is of the opinion ADPC&E's efforts to remedy the permit violations *must be* characterized as diligent prosecution.

842 F.Supp. at 1149 (emphasis added).

Equally misplaced is AWF's challenge to the adequacy of the penalty amount imposed by ADPC&E. In assessing civil penalties against ICI, ADPC&E considered factors very similar to those in Section 1319(g)(3). 842 F.Supp. at 1145, 1148. ADPC&E's determination of the penalty amount was based on professional judgment and took into account the history and seriousness of the past violations, as well as ICI's initiative, cooperativeness, and commitment to spend a significant sum of

money to achieve compliance expeditiously. 29 F.3d at 380; 842 F.Supp. at 1148; App. 3a-5a. The record also shows that the amount assessed in the original CAO was reviewed by no less than five ADPC&E staff members prior to issuance. App. 3a. While the total amount of the penalties assessed ($2,500) was substantially less than the maximum allowed under the AWAPCA and CWA, it is consistent with penalty amounts ADPC&E previously required other permit holders to pay under similar circumstances. 842 F.Supp. at 1148. Had AWF wanted to challenge ADPC&E's penalty determinations based upon ICI's alleged "economic benefit" and greater "ability to pay," it could have easily done so. AWF had repeated opportunities to intervene and present its views to ADPC&E, but simply chose not to. The court of appeals' assessment of AWF's strategy bears repeating:

> AWF could have intervened in the administrative process but instead chose to collaterally attack the enforcement action through this federal lawsuit. We have no reason to believe that AWF would have been denied meaningful participation in the administrative process had it intervened.

29 F.3d at 382.

2. The Eighth Circuit further agreed with the district court that the Arkansas Water and Air Pollution Control Act is "*comparable*" to 33 U.S.C. §1319(g) within the meaning of Section 1319(g)(6)(A)(ii). The district court made a thorough examination of the provisions for penalty assessment, public participation, and judicial review under the AWAPCA and Section 1319(g), and concluded that the two laws' provisions were indeed comparable in *all* critical respects. 842 F.Supp. at 1144-47. However, before the Eighth Circuit, and now this Court, AWF has argued only that the Arkansas statute is not comparable to the CWA with respect to the public

notice and comment provision in Section 1319(g)(4)(A). That argument is based upon an overly-restrictive view of the "comparability" requirement and is wrong.

There is no language in 33 U.S.C. §1319(g)(6)(A) (or its legislative history) that suggests Congress intended to require that states adopt virtually the same administrative penalty procedures that apply to EPA under Section 1319(g). Instead, Congress chose the adjective "comparable" to explain the requirement for state-prosecuted actions. *See* 33 U.S.C. §1319(g)(6)(A) ("(ii) . . . under a State law *comparable* to this subsection, or (iii) . . . under this subsection, or such comparable State law. . . .") (emphasis added). Its repeated use of this term indicates plainly that state administrative procedures need to be similar or analogous to the provisions in Section 1319(g), but not necessarily identical. *See also* 133 Cong. Rec. S737 (daily ed. Jan. 14, 1987) (remarks of Senator Chafee that a state's law must provide procedures "similar" or "analogous" to those in Section 309(g) of the CWA).

The clear congressional intent expressed in Section 1319(g)(4)(A) is that, in an administrative proceeding in which a civil penalty is assessed, notice and a reasonable opportunity for comment must be provided to facilitate interested third-party input at a point where that input can be incorporated into the resolution of the proceeding. Legislative history confirms that what is required is that "[p]ublic notice of such proceedings must be given in a manner that will apprise interested citizens of the proceedings." S.Rep. No. 50, 99th Cong., 1st Sess. 27 (1985). Arkansas law clearly meets this requirement.

The Arkansas Water & Air Pollution Control Act requires the ADPC&E to "ensure public notice, public

participation and an opportunity for public hearing in respect to National Pollutant Discharge Elimination System permit applications and *actions related to* them in accordance with applicable state and federal law and rules and regulations." Ark. Code Ann. §8-4-207(5) (emphasis added). The AWAPCA also requires ADPC&E to make available to the public for inspection and copying all NPDES permits, permit applications, and related documentation. Ark. Code Ann. §8-4-207(6)(A). Additionally, any person who has submitted comments on any enforcement matter can request an adjudicatory hearing and be made a party to the proceeding. Ark. Code Ann. §§8-4-210, 8-4-212; ADPC&E Regulation No. 8, Part VII, §1. ADPC&E's regulations further provide that "any person" may intervene "*at any stage*" of an enforcement proceeding if such person timely files a petition to intervene and, either had a statutory right to initiate the proceeding, or has an interest which may be adversely affected by the outcome of the proceeding. ADPC&E Regulation No. 8, Part VII, §5(a). ADPC&E's orders do not become final for at least 30 days after they are issued by the Director. *Id.*, Part V, §7(a); Part VI, §1.

It bears considerable emphasis that ADPC&E's procedures for public notice and participation in administrative enforcement proceedings are consistent with EPA published guidance that implements the Section 1319(g) notice and participation requirements.[5] That document,

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[5] ADPC&E's procedures also comply with EPA's mandatory requirement for public participation in state administrative enforcement proceedings adopted for the purpose of reviewing state NPDES permit programs pursuant to 33 U.S.C. §1342. Under 40 C.F.R. §123.27(d), a state NPDES program provides adequate public participation in its enforcement process if the state has established "authority which allows intervention as of right in any

[footnote continued]

Guidance on Class I Clean Water Act Administrative Penalty Procedures (July 27, 1987) addresses Class I administrative penalties under Section 1319(g)(2)(A) (penalties of up to $25,000) and provides that EPA "shall give public notice by mailing a copy of the proposed administrative penalty order to . . . any person who requests notice." *Id.* at 2-3. In addition, "*at [EPA's] sole option,*" additional notice may be given to persons on a mailing list or through publication in a newspaper of general circulation. *Id.* at 3. It is clear from this guidance that EPA does not interpret Section 1319(g)(4) as requiring the kind of broad public notice that AWF has argued is essential to a finding that Arkansas law is comparable to Section 1319(g).[6] Had EPA, rather than ADPC&E, been the enforcing agency in this case, AWF would not have had any claim to notice of a type that is more demanding than that provided here. Put another way, the notice requirements that govern U.S. EPA's administrative enforcement are factually and legally indistinguishable from the notice that AWF initially acquired when it examined ACPC&E's public files.

It is undisputed that AWF had actual notice of the original CAO entered against ICI for nearly five months before filing this lawsuit, and that AWF also received actual notice of the Corrected CAO and each of the

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civil or administrative action to obtain remedies . . . by any citizen having an interest which is or may be adversely affected." ADPC&E Regulation No. 8, Part VII, §5(a) satisfies this requirement.

[6]When Congress intends that notice be given to the public at large, Congress knows how to express that intent. *See* 33 U.S.C. §1319(g)(4)(c) ("If the Administrator . . . denies a hearing under this subparagraph . . . the Administrator . . . shall . . . publish in the Federal Register, notice of and the reasons for such denial.")

amendments. It was not by accident or chance that AWF learned of ADPC&E's enforcement action against ICI. AWF learned of the action in precisely the same manner that it learned of ICI's NPDES noncompliances—through reviewing the ADPC&E's NPDES permit records.[7] It also can not be denied that AWF had every opportunity to intervene in the enforcement proceeding, but did not do so. Instead, it chose to remain on the sidelines watching ADPC&E's enforcement action and then collaterally attacked the agency's actions. Again, as the Eighth Circuit observed, there is "no reason to believe that AWF would have been denied meaningful participation in the administrative process had it intervened." 29 F.3d at 382. AWF should not now be heard to complain that it did not have adequate notice and opportunity to participate in the state enforcement action when, in actuality, AWF chose to ignore its administrative remedies.[8]

Under these circumstances, the Eighth Circuit was clearly justified in concluding that Arkansas law is "com-

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[7] It is also noteworthy that, prior to filing suit under the CWA, citizen plaintiffs have an affirmative duty to conduct a reasonable inquiry into the facts to determine whether a potential defendant is "in violation" of the CWA in order to make a good-faith allegation of ongoing violation for jurisdictional purposes. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65, 108 S.Ct. 376, 385, 98 L.Ed.2d 306 (1987). Therefore, at a minimum, AWF was required to examine ICI's NPDES permit, discharge monitoring reports, and related documents (including ADPC&E's enforcement orders) to ascertain whether ICI would likely have continuing violations of its permit.

[8] With the exception of attorney's fees, AWF could have requested in the administrative action the same relief it requested in its complaint in this matter. *See* Ark. Code Ann. §§8-4-103, 8-4-203, 8-4-211 (ADPC&E's authority to issue compliance orders and assess administrative civil penalties).

parable" to the provisions for public notice and participation in Section 1319(g)(4).

3. The court of appeals was also correct in holding that 33 U.S.C. §1319(g)(6)(A) bars AWF's entire action under the facts in the case. AWF has argued that it is entitled to pursue claims for declaratory and injunctive relief even though those claims are based entirely on violations that were also the subject of ADPC&E's ongoing enforcement action. However, the terms of Section 1319(g)(6)(A), together with other sections of the CWA, show that the Eighth Circuit gave a reasonable application to the statute consistent with its meaning and legislative purpose.

33 U.S.C. §1319(g)(6)(A) provides that a violation that is the subject of a prior state action under a comparable state law "shall not be the subject of a civil penalty action under . . . section 1365 of this title." However, as the court of appeals stated, the statute "makes no mention of whether a citizen could otherwise bring an action for declaratory or injunctive relief." 29 F.3d at 382. In evaluating this question, it is particularly appropriate to examine the provisions of the law as a whole and look to its object and policy. *United States Nat. Bank of Oregon, supra*, 112 S.Ct. at 2182.

When Congress enacted the Clean Water Act, it intended for the states to maintain primary responsibility and the federal government (through EPA) secondary responsibility to "prevent, reduce, and eliminate [water] pollution." 33 U.S.C. §1251(b); *Gwaltney v. Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60, 108 S.Ct. 376, 383, 98 L.Ed.2d 306 (1987) (stating that the Senate Committee "intend[ed] the great volume of enforcement actions [to] be brought by the State");

see also Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., Inc., 777 F.Supp. 173, 177 (D. Conn. 1991) ("the Act contains 'repeated expressions of the intent of Congress that the States bear responsibility for management and enforcement in the first instance, though leaving ultimate authority to the Administrator of the EPA.' ") (quoting Grad, *Treatise on Environmental Law*, 3-103). Congress envisioned that private citizens, on the other hand, would serve in only a supplemental role—as private attorneys general "if the Federal, State and local agencies fail to exercise their enforcement responsibility." *Gwaltney, supra*, 484 U.S. at 60, 108 S.Ct. at 383 (quoting S.Rep. No. 92-414, p. 64 (1971)). Therefore, when enacting the citizen suit provision in Section 505 of the CWA, 33 U.S.C. §1365, Congress authorized citizens to enforce certain provisions in the Act *only "[i]n the absence of federal or state enforcement."* *Gwaltney*, 484 U.S. at 53, 108 S.Ct. at 379 (emphasis added). See 33 U.S.C. §1365(a) ("*Except as provided in subsection (b) of this section and section 1319(g)(6) of this title*, any citizen may commence a civil action. . . .") (emphasis added). The central purpose of the citizen suit provision is to "[permit] citizens to abate pollution when the government *cannot* or *will not* command compliance." *Id.* at 62, 108 S.Ct. at 384 (emphasis added).

The dichotomy between government and citizen roles is also apparent in the availability of enforcement remedies. Congress has afforded EPA a choice of several different remedies that it can pursue to enforce violations of the CWA. EPA can issue compliance orders administratively and/or bring a civil action in district court to obtain coercive relief against a violator. 33 U.S.C. §1319 (a) and (b). The agency can also assess civil penalties

administratively and/or bring a civil "penalty action" in district court. 33 U.S.C. §1319(b), (d), and (g). This Court recognized the separate grant of EPA's authority for these remedies in *Gwaltney*. *See supra* at 108 S.Ct. at 382 (citing *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987)). With respect to citizens, it is apparent that Congress intended to somewhat limit the availability of these same enforcement remedies:

> In contrast, §505 of the Act does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referred to in the same subsection, even in the same sentence. 33 U.S.C. §1365(a). The citizen suit provision, suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement.

Gwaltney, supra at 58. 108 S.Ct. at 382. In holding in *Gwaltney* that citizens cannot sue violators for wholly past violations, the Court concluded that a claim for coercive relief is a necessary element of any action for civil penalties brought by citizens. *Id.*

Given that every citizen suit seeking civil penalties must be connected to a claim for coercive relief, it would make no sense for Congress to preclude an action for penalties without also precluding the underlying action for compliance based upon the same violations. In Section 1365(b), Congress clearly expressed its intent to authorize "no action" whatsoever where EPA or a state "has commenced and is diligently prosecuting" a civil or criminal action against a violator. It would seem logical that Congress intended that a similar meaning apply where EPA or a state "has commenced and is diligently prosecuting" an administrative action against

a violator. The language in Section 1319(g)(6)(A) is consistent with this intent. The statute provides that violations that are the subject of administrative enforcement "shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title." Section 1319 (g)(6)(A) bars each of these court actions completely, and the phrase "civil penalty action" distinguishes a civil action which EPA may initiate in court from an administrative action by the agency itself.[9]

In sum, it follows that where as in this case a private citizen seeks penalties as well as declaratory and/or injunctive relief, and the violations on which those claims are based are already the subject of an administrative enforcement action that a state "has commenced and is diligently prosecuting," then the entire action is barred under Section 1319(g)(6)(A). The contrary position advanced by AWF would lead to the odd result of giving deference only to ADPC&E's authority with respect to penalty assessment and ignoring its injunctive authority. As the First Circuit pointed out in *North and South Rivers Watershed Ass'n. v. Scituate*, 949 F.2d 552 (1st Cir. 1991), "[s]uch a result would not only be undesirable, . . . it would be absurd." Furthermore, permitting AWF's suit for injunctive relief to go forward would undermine the government enforcement process

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[9]This interpretation is fully supported by remarks of Senator Chafee, the principal author of the Senate bill that became Section 1319(g)(6), at the time of enactment: "[Section] "309(g)(6) sets out limitations that preclude citizen suits where [certain enforcement action have been taken and] limits Federal civil actions under subsections 309(d) and 311(b)." 133 Cong. Rec. S737 (daily ed. Jan. 14, 1987) (emphasis added).

and change the nature of the citizens' role from "interstitial" to "intrusive." *Gwaltney*, 484 U.S. at 61, 108 S.Ct. at 383.[10]

II.
THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH A DECISION OF ANY OTHER COURT OF APPEALS

The Eighth Circuit's decision in this case is not in conflict with a decision of any other United States Court of Appeals. The First Circuit is the only other appellate court that has addressed the issues decided by the Eighth Circuit in this case (i.e., (1) whether 33 U.S.C. §1319(g)-(6)(A)(ii) bars a citizen suit when a state has previously commenced and is diligently prosecuting an administrative enforcement action against the defendant for the same violations under a comparable state law, and (2) whether Section 1319(g)(6)(A) bars a citizen suit claims for declaratory and injunctive relief, as well as the claim for civil penalties).

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[10]This Court addressed the dangers of this kind of interference with state administrative enforcement in *Gwaltney*:

> Suppose . . . that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtained considerably. The same might be said of the discretion of state enforcement authorities.

484 U.S. at 60-61, 108 S.Ct. at 383. ADPC&E considered AWF's collateral attack to be "in direct conflict with [the Department's] attempts to protect the environment through proper administrative procedures and remedies." App. 8a.

In *North & South Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991), a case factually quite similar to this one, the First Circuit held that 33 U.S.C. §1319(g)(6)(A) barred a citizen group's action against the town of Scituate because the Massachusetts Department of Environmental Protection had previously commenced and was diligently prosecuting an enforcement action against the town under a comparable state law. The First Circuit examined the Massachusetts' statutory scheme as a whole and found it to be comparable to Section 1319(g). The court of appeals gave the following reasons for its conclusion:

> First, the interdependent scheme of the State Act effectuates its goals of ensuring compliance with and enforcement of protective regulations. The focus of the statutory bar to citizen's suits is not on state statutory construction, but on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action. DEP is already acting to correct the violations upon which Appellants focus their action. Duplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedying violations in order to focus on the duplicative effort.
>
> Second, the goal of all actions brought under the Clean Water Acts [sic] is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. §1251(a). Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further this goal. They are, in fact, impediments to environmental remedy efforts.

> *It is enough that the Massachusetts statutory scheme, under which the State is diligently proceeding, contains penalty assessment provisions comparable to the Federal Act, that the State is authorized to assess those penalties, and that the overall scheme of the two acts is aimed at correcting the same violations, thereby achieving the same goals.* What the Appellant's suit seeks to remedy is already in the process of being remedied by the State Administrative Order, an action comparable to section 309(g).

949 F.2d at 556 (footnotes omitted; emphasis added).

The First Circuit also held that Massachusetts' provisions for public participation were comparable to Section 1319(g)(4)(A) even though the state act did not provide for *prior* public notice of enforcement orders since: (1) all administrative orders issued by the state agency were public documents; (2) any individual could intervene in actions brought to assess civil penalties upon showing adequate cause; and (3) any person having an interest in the matter could file a claim for an individual hearing. *Id.* at 556, n.7.

In the present case, the Eighth Circuit expressed agreement with the First Circuit's construction of the "comparability" provision in §1319(g)(6)(A), stating:

> We agree with the reasoning in *Scituate* that the comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.

29 F.3d at 381-82 (citation omitted).

It should be noted that the facts supporting a finding of "comparability" are even more compelling in the present case than in *Scituate.* Arkansas has been authorized by EPA to administer the federal NPDES permit program under the Arkansas Water and Air Pollution Control Act, whereas Massachusetts' act had not received certification by EPA. 949 F.2d at 556, n.8. Additionally, ADPC&E assessed civil penalties against ICI, whereas the town of Scituate was not actually penalized, although the order against it reserved the right to do so at a later date. 949 F.2d at 554. Furthermore, AWF received actual notice of ADPC&E's enforcement action and was clearly capable of intervening, had it chosen to do so, whereas there is no indication of the citizen plaintiff receiving the same notice in *Scituate.*

AWF's argument that the Eighth Circuit's decision in this case conflicts with the Ninth Circuit's decision in *Washington PIRG v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993) is also incorrect. In *Pendleton, supra,* EPA instituted an administrative "compliance action" against Pendleton Woolen Mills, Inc. approximately one and a half years before Washington Public Interest Research Group brought its citizen suit against Pendleton. As the court of appeals emphasized in its holding, "the EPA was not pursuing an administrative penalty under section 1319(g). Rather, the EPA acted pursuant to section 1319(a) when it issued a compliance order to Pendleton." 11 F.3d at 885. After analyzing the statutory provision in Section 1319(g)(6)(A)(i), the First Circuit concluded that the citizen suit was not barred since EPA clearly had not instituted an action for administrative penalties under Section 1319(g). The Court made no analysis whatsoever of Section 1319(g)-(6)(A)(ii) which was addressed by the Eighth Circuit in

this case. Furthermore, the Ninth Circuit did not reach the issue of whether a citizen suit seeking declaratory and injunctive relief can be barred by Section 1319(g), since the court held that "the compliance order pursued by the EPA [did] not bring into play the citizen suit preclusion of section 1319(g)(6)." *Id.* at 887. Therefore, it is clear that the Eighth Circuit's holdings in the present case do not conflict in any way with the Ninth Circuit's decision in *Pendleton*, and AWF's allegation of a "split of authority" in the circuits is wrong.[11]

The Court should decline AWF's invitation to correct any alleged misreading of *dicta* in this Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., supra*. The Eighth Circuit fully considered and correctly decided the issues presented in this case, and its decision is clearly not in conflict with any of the holdings (or *dicta*) stated in *Gwaltney*.

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[11] Additionally, the district court decisions alleged by AWF to be in direct conflict with the Eighth Circuit's decision are also readily distinguishable on their facts and the law. *See NRDC v. Vygen Corp.*, 803 F. Supp. 97 (N.D. Ohio 1992) (Ohio's law held not comparable to Section 1319(g) since intervention as of right was not provided and the Ohio agency had discretion to avoid public participation in the enforcement process); *PIRG v. GAF Corp.*, 770 F. Supp. 943 (D. N.J. 1991) (held that New Jersey's law did not provide for adequate public comment or a hearing on an administrative order, but opinion did not discuss whether the citizen group received notice of the order); *Atlantic States Legal Found., Inc. v. Universal Tool & Stamping Co., Inc.*, 735 F. Supp. 1404 (N.D. Ind. 1990) (held that Indiana's laws were not comparable to Section 1319(g) because the state's statutes (1) did not specify any factors to be considered in assessing an administrative penalty (2) did not allow for judicial review of administrative orders by citizens (3) did not require public notice of hearings, and (4) did not provide the public with a reasonable opportunity to comment upon penalty assessments).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAMES F. GOODHART
BANKS, DODSON,
GOODHART & SPADES
425 West Capitol Avenue
Suite 1590
Little Rock, Arkansas 72201
(501) 375-8700

Counsel for Respondent,
ICI Americas Inc. (now
known as ZENECA Inc.)

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-C-91-681

ARKANSAS WILDLIFE FEDERATION,
Plaintiff

vs.

ICI AMERICAS, INC.

Defendant

* * * * * * * * * * *

DISCOVERY DEPOSITION OF MARK BRADLEY
(Taken June 17, 1992)

* * * * * * * * * * *

[EXERPTS]

EXAMINATION

[4] BY MR. LEDBETTER:

Q. State your name for the record, please.
A. It's Mark Bradley.
Q. Mark, where are you employed?
A. Arkansas Department of Pollution Control & Ecology.

* * *

[9] Q. Did you meet with representatives of ICI on March 5th?

A. Yes.

Q. Tell me about that meeting. Who was present?

A. It was Hayes Baber and Irvin Wheeler, and Joe Williford was also present, who is my supervisor. And what we discussed were the 30 violations and to see what action, if any, they had [10] taken because of those violations. There'd also been an inspection in December of '90 by one of our inspectors. And we discussed that, because I had already gotten the response that they had made to the inspection.

I found out in the meeting that they had had a couple of—I guess at that time—I guess they'd had two meetings with plant personnel about the NPDES problem and what needed to be done to correct it. And they'd already taken some—about four different phases they were looking at to correct the problem.

Q. They had already taken those, or they were looking at taking those?

A. They had developed a plan to take those actions.

Q. Do you know when they developed that plan?

A. I believe it was November of '90 when they first had their meeting with their plant personnel, somewhere in that same time frame.

* * *

[11] Q. Was there a consent administrative order submitted to ICI at that meeting?

A. We discussed the contents of what would be in the consent order. I don't believe that we presented one at the meeting. It was sent to them, because our normal procedures was to discuss what we intend to do, route it through our channels, and then mail it to them. So I don't believe one was given to him at the meeting.

Q. What was discussed as far as what would be done concerning enforcement by ADFC&E;

A. We discussed three actions we normally take. One is a consent administrative order, which generally is the way the agency would like to go, and it's in the best interest of the industry. If they didn't want to go that route, then a notice [12] of violation would be the route that we would go. That would go before an administrative law judge. And if we didn't want to go that route, then we could go the legal route.

Q. What's the legal route?

A. Take it to court for a civil action.

Q. And what was the company's response?

A. They wanted them to do a consent administrative order with us.

Q. All right.

A. And based on that, the draft was routed through our people and sent to them.

Q. You drafted it yourself?

A. Yes.

Q. Who did you route it through?

A. Joe Williford. The NPDES branch manager, Marysia Jastrzebski, the assistant water division chief, Dick Quinn, legal division, and the director, Randall Mathis.

Q. And that was before it was sent to ICI?

A. Yes.

Q. Did you discuss at the meeting the history of violations of the company?

A. Yes.

Q. Were you aware that the violations dated back to the effective date of their NPDES permit?

A. What I had looked at as far as the meeting was concerned [13] was just the last year, but I knew there were some prior to that.

Q. Did you have any information concerning the seriousness of the violations?

A. I remember I looked at the violations, but I don't recall the severity of them.

Q. At that time did that enter into your determination as how to proceed with this matter?

A. It did.

Q. In what way?

A. What we intended through the consent order was—well, two things, to correct previous violations which date back to the beginning of the permit, and see if a corrective action plan would be presented that we would approve and get them into compliance. That was the intent of the consent order.

Q. When you say "correct previous violations," I don't understand what you're referring to.

A. The penalty that would be addressed in the consent order would take care of past violations.

* * *

Q. Okay. And what was the penalty that was proposed?

[14] A. $1,000.

Q. How did you calculate that penalty?

A. It was based upon professional judgment, based upon their having developed a plan that we weren't even aware of that they had presented at the meeting, that they were taking action before we called them into a meeting, and looked at the number of violations and addressed the $1,000 penalty.

Q. For 30 violations of a permit, how do you—I mean, what factors are used in calculating? Did you prepare a document that reflects how you decided the

penalty should be calculated? I mean, was there a dollar value per violation? Was it higher for COD and lower for zinc? How did you calculate this?

A. A $1,000 penalty was the minimum penalty typically that we would look at, so we went with that penalty.

Q. Why did you go with the minimum?

A. Because they had taken action on developing a plan which was going to involve some capital outlay. It wasn't a problem that was being ignored. They were already addressing it, so we decided we'd go with the minimum penalty.

* * *

[35] BY MR. GOODHART:

Q. Mr. Bradley, I'm going to show you a document and ask you if you can identify that, please.

A. This is a consent order that was entered into April of '91.

* * *

Q. At any time during the March 5th, 1991 meeting that you had mentioned earlier, did you tell Mr. Wheeler or Mr. Baber that the consent administrative order that was being discussed and that the payment of the fine that was mentioned, $1,000, that that was intended to cover only certain non-compliances under ICI's permit during 1990 and January of 1991?

A. No. Our usual procedure in the meetings was to mention [36] that the consent order would cover the previous violations.

Q. Okay.

A. And not narrow it down to certain ones.

Q. The previous violations under the current NPDES permit?

A. Yes.

Q. Was there any mention by Mr. Williford to the effect that that the department only wanted to enter into a CAO for non-compliances from January 1990 to Januare 1991?

A. No.

Q. So that I'm clear, was it your understanding that the agreement was that the past non-compliances for ICI's permit, which had been issued in the fall of 1988, that those past non-compliances were being settled through the CAO and the payment of the $1,000 civil penalty?

A. That was our intent with the consent order.

* * *

APPENDIX B

[SEAL] [SEAL]

STATE OF ARKANSAS

DEPARTMENT OF
POLLUTION CONTROL AND ECOLOGY
8001 National Drive, P.O. Box 8913
Little Rock, Arkansas 72219-8913
Phone: (501) 562-7444
Fax: (501) 562-4937

February 8, 1992

Mr. Dan Palmer, Attorney
Office of Enforcement
Environmental Protection Agency
401 M St. SW
Washington D.C.

RE: PC&E Consent Administrative Order 91-074-004, Amendment #3
NPDES Permit AR0042901

Dear Mr. Palmer:

As we discussed on the phone today I am transmitting to you a memo I recently prepared dated Jan. 21, 1993 to Steve Weaver, PC&E Chief Counsel, concerning Permit AR0042901. I also conveyed to you that I had discussed the matter at length with Mr. Chuck Bennett, Chief, Water Division, PC&E, who indicated that we were not moving forward with any further enforcement action at the present time and that there was no reason to modify the latest Amendment. It is the Department's position that the Amendment is not a modification of the Permit, but merely an agreement between PC&E and ICI with regard to enforcement of specific items until such time as the permit issues can be appropriately resolved.

Concerning the recently filed Motion for Emergency Declaratory Relief by the Arkansas Wildlife Federation, it is our position that the Plaintiff (AWF) could appeal the Amendment to our Commission, if done in a timely manner. Their attempts to protect their "continuing violations" are in direct conflict with our attempts to protect the environment through proper administrative procedures and remedies. Also, we do not feel that a ruling one way or another will set any precedent for future cases, however, if your Agency chooses to intervene in the matter as you stated, we will certainly provide all the facts available to us and any information you desire.

Sincerely,

/s/ Randal K. Oberlag
Randal K. Oberlag, P.E.
Enforcement Engineer/Attorney
NPDES Enforcement Section

cc: Mr. Chuck Bennett
Mr. Joe Williford
Mr. Steve Weaver

STATE OF ARKANSAS
DEPARTMENT OF POLLUTION CONTROL
AND ECOLOGY
MEMORANDUM

DATE: January 21, 1993

TO: Mr. Steve Weaver, Chief Counsel

FROM: Randal K. Oberlag, Enforcement Engineer/ Attorney

SUBJECT: Zeneca, Inc.; a.k.a. I.C.I. Americas, Inc.– NPDES #AR0042901

Steve–At the request of Marysia Jastrzebski, P.E. I have prepared this memo with attached information which provides a review of the Department's Enforcement action with respect to the subject permit. This facility is involved in a citizens suit, (Plaintiffs are represented by Sam Ledbetter) with ICI being represented by Jim Goodhart and Chuck Nestrud. The following is a summary of the CAO activity and then is followed by a synopsis of relevant correspondence and meetings held since the CAO was issued.

SUMMARY OF CAO ACTIVITY

CAO#	EFFECTIVE DATE	PENALTY	DATE PAID
91-074	4/16/91	$1000	4/18/91
91-074-001	9/9/91	n/a	n/a
91-074-002	12/20/91	$500	1/10/92
91-074-003	4/30/92	$500	5/15/92
91-074-004	1/7/93	$500	pending

CAO 91-074 was the result of an enforcement meeting held on 3/5/91. The meeting was called due to numerous

effluent violations. The CAO required corrective action that was discussed in the meeting in addition to the payment of a penalty. (A written version of the corrective action plan presented at the meeting was not found in the files.)

CAO 91-074-001 was a "corrected" version of the CAO which expanded the listing of past effluent violations in the Findings of Fact back to 11/88. The wording was likewise modified to more broadly cover past violations to be settled under the CAO.

CAO 91-074-002 (Amendment #1) extended the compliance schedule date from 12/31/91 to 4/30/92 for Achieve Compliance. The Amendment also levied a $500 penalty "for all violations occurring up to and including the date (of) this agreement. . . ." A Request for Extension was filed by Chuck Nestrud on Dec. 26, 1991 and included supporting material which was properly reviewed. The 4/30/92 achieve date was closed out by 91-074-003.

CAO 91-074-003 (Amendment #2) required ICI to submit an application to establish effluent limits for new outfall 004 by 6/15/92 (submitted on time) based on a Construction Permit issued on April 2, 1992, which anticipated the elimination of Outfalls 001, 002 and 003 and the construction of a new Outfall 004 which combined the flows from the three existing Outfalls. The Amendment required ICI to complete 004 construction by 7/31/92 (completed on time). ICI was required by the Amendment to come into full compliance with its permit by 12/15/92. Until ADPC&E made a decision on the Outfall 004 application or 12/15/92, whichever came first, all reporting requirements would remain the same, except the requirements for Zinc would be "report only." ICI was also required to provide sample data on

outfall 004 as an addendum to the DMRs, as well as to continue to monitor and report at the catch basin points of the former 3 Outfalls. A $500 penalty was levied. Further engineering studies regarding the zinc were required by the Amendment since they were required to submit an application to establish effluent limits on Outfall 004. It was the opinion of enforcement that this process would determine the zinc limits with a number that would be determined on a technical basis utilizing current standards, as well as, allowing the facility to continue its process of zinc source discovery and reduction. It was anticipated by enforcement that a permit for Outfall 004 could be and would be issued within a 6 month review time.

CAO 91-074-004 (Amendment #3) discontinued sampling and reporting for outfalls 001, 002, and 003 effective 12/15/92, since these outfalls no longer existed and further sampling at the catch basins at these points would not yield any useful new information. The Amendment established outfall 004 as the relevant sampling and reporting point. The effluent limits for outfall 004 would be the same as specified in the permit for 001 except Zinc would be "report only" until 10/31/93. A $500 penalty was assessed for "ADPC&E's costs." This amendment was the result of the Department not being able to issue a permit modification to provide effluent limitations for Outfall 004, which was constructed under the Construction Permit issued on April 2, 1992. In a meeting with ADPCE in 12/8/92, ICI requested the permit modification (or new permit) per it's application of June 15, 1992. The implementation strategy for metals is current being developed by the Department based on EPA Rule promulgation and as the Department

is unable to continue with this request. Until the strategy is finalized, limits on metals for permits and permit modifications cannot be given. Since ICI's present permit expires on Oct. 31, 1993, and there is no methodology at present for giving zinc limits, the Amendment extending monitoring and reporting conditions through Oct. 31, 1993 and requiring "report only" for zinc was appropriate. The facility agreed to be bound by the remaining limits of the "3 terminated outfalls" for Outfall 004.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

ARKANSAS WILDLIFE FEDERATION
Plaintiff

v.

ICI AMERICAS INC.
Defendant

Case Number LRC-91-681

STATE OF ARKANSAS
COUNTY OF PULASKI

AFFIDAVIT OF STEVE A. WEAVER

Steve A. Weaver, being first duly sworn, states:

1. I am currently employed as the Chief Legal Counsel for the Arkansas Department of Pollution Control & Ecology ("ADPC&E") and have worked in that capacity since October 1988. I have been employed at ADPC&E since 1987.

2. Statements made in this Affidavit are based upon my personal knowledge, and upon information which has become available to me in my employment capacity, and are true and accurate to the best of my information and belief.

3. Consent Administrative Orders ("CAOs") are the typical manner in which administrative enforcement actions are resolved at ADPC&E. Typically ADPC&E sub-

mits a proposed CAO to the regulated entity. If the regulated entity is in agreement with the ADPC&E's proposal, it executes the CAO and forwards it to ADPC&E. The Director reviews it, and if he decides to execute the CAO he signs it and the CAO is then given to a secretary in the Legal Division who maintains the Legal Information System ("LIS") files. The CAO is then given a LIS number, the original CAO is placed in the LIS files, and a copy is mailed to all parties. The LIS files, as well as all records, reports, and other information, including all documents related to National Pollutant Discharge Elimination System (NPDES) permits, are public documents that are made available to the public for inspection and copying during the regular business hours of the ADPC&E in accordance with the policies of ADPC&E and the Arkansas Freedom of Information Act of 1967, Ark. Code Ann. §25-19-101, *et seq.*

4. The Environmental Protection Agency ("EPA"), which is required to assess ADPC&E's administration of the State NPDES Program on a continuing basis for consistency with the Federal Clean Water Act and all applicable federal regulations and policies, has never notified the State in writing that any of the State's public participation policies, practices, and/or procedures are in any way deficient.

/s/ Steve A. Weaver
Steve A. Weaver

SWORN TO AND SUBSCRIBED before me this 5th day of October, 1992.

/s/Patricia A. Noller
Notary Public

My Commission Expires:
12/17/2000